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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

LINCOLN NORTH DEVELOPMENT CORPORATION,

Petitioner,

v.

TOWN OF KEARNY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is an appeal that arises from the New Jersey state court system. It has involved efforts of Lincoln North Development Corporation ("Lincoln North"), a trade association of South Kearny, New Jersey, business owners, in challenging the constitutionality of Ordinance 64, a draconian anti-trucking ordinance that will flatten the tires of interstate commerce in the Tri-State area. The Town of Kearny promulgated Ordinance 64 with the intention of ringing the ultimate death knell for a critical Mecca of interstate commerce, which is located in a strategic chokepoint of the Tri-State trucking and transportation industry. Over 1,500,000 trucks arrive and depart annually from South Kearny, shipping their goods across our nation from coast-to-coast. If this Petition is not heard, the lights of these trucks, which serve our nation daily, will go out and a new and darker commercial era will commence.

Three questions are presented:

(1) This case presents a critical issue of first impression; *i.e.*, whether a municipal ordinance which seeks to increase property tax revenues, but will have the effect of suffocating and ultimately destroying a vital center of interstate commerce and crippling the trucking industry in the Tri-State area, violates the Dormant Commerce Clause.

(2) Did the New Jersey courts err in upholding the summary judgment dismissal of Petitioner's argument that the operation of the expansive trucking support facilities surrounding the massive CSX railhead cannot be interfered with under the preemptive authority of the Interstate Commerce Commission Termination Act ("ICCTA")?

(3) Can a municipality enact an ordinance which, on its face, renders unlawful the trucking operations of a Regional Federal Postal Distribution Center, by placing it in the no-trucking zone, in conflict with federal criminal statutes and case law dating back to the Founding of the Republic?

CORPORATE DISCLOSURE STATEMENT

The Town of Kearny is a municipal corporation of the State of New Jersey.

Lincoln North Development Corporation is a New Jersey non-profit corporation, which was formed as a trade association of South Kearny, New Jersey, businesses in 1987.

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OPINION BELOW

On May 15, 2008, the Supreme Court of New Jersey denied Lincoln North's Petition for Certification without opinion. *See* Appendix D. The New Jersey Superior Court, Appellate Division, A-1960-06T5, filed a not-for-publication per curiam opinion, affirming without independent analysis orders of the New Jersey Superior Court Law Division. *See* Appendix A. Said Law Division opinions and orders were issued on May 4, 2006, rendering partial summary judgment, and October 27, 2006, disposing of the remaining issues after a trial on the merits. *See* Appendices B-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257. Lincoln North seeks this Court's review of the March 19, 2008 Opinion and Order of the New Jersey Superior Court, Appellate Division, and the New Jersey Supreme Court's May 15, 2008 denial of Certification.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, § 8, cl. 3: "The Congress shall have the power. . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

United States Constitution, § 8, cl. 7: "The Congress shall have the power. . . . To establish Post Offices and Post Roads."

United States Constitution, Article VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Town of Kearny, County of Hudson, 2004-(O)-64.

The Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101, *et seq.*

18 U.S.C. § 1702, § 1703(a) (criminal penalties for interference with federal mails).

STATEMENT OF THE CASE

For over fifty (50) years, trucking and trucking-related uses have been the dominant land use in South Kearny, New Jersey. This has been a boon to interstate commerce, as tens of millions of trucks have come to load and unload in South Kearny. But the Town of Kearny believed that more taxes could be collected if these truck terminals, which they considered to be an eyesore, were to be simultaneously phased out and shut down, effective immediately. Thus, the governmental decision was made that trucking operations should be walled in and covered with concrete, even though the Town's representatives knew, or certainly should have known, that an indoor trucking business and industry is an oxymoronic construct.

The stakes of this Petition are high. It will determine whether a critical artery of interstate commerce will be destroyed. It will decide if municipalities may legally empower their agents to harass and to sanction federal postal officials with impunity. It will determine if the preemptive scope of the Interstate Commerce Commission Transportation Act can be ignored. It will determine if the trucking industry can have a "home" anywhere in New Jersey or anywhere else in the Northeast.

Historically, South Kearny has been a thriving trucking/heavy industrial community. Eighty percent of South Kearny businesses engage in and support the trucking industry. Before the enactment of Ordinance 64, the Town of Kearny allowed truck terminals, motor freight terminals, railroad terminals and yards, cartage and express facilities as a matter of right throughout all of South Kearny (the "SKM" Zone). Ordinance 64 created two zones within the former SKM zone, designated as SKI-N and SKI-S (which together encompassed all of South Kearny). Per Ordinance 64, truck terminals are now a non-conforming use in the SKI-S zone.

There are no residential areas in South Kearny and no residential areas adjacent to it. South Kearny has excellent access to the major area highways, including the New Jersey Turnpike, U.S. Routes 1 and 9, Interstate Route 78 and Interstate Route 280. The truck route of Routes 1 and 9 bisect South Kearny almost in the middle of the South Kearny peninsula.

The Town of Kearny adopted Ordinance 64 in November, 2004. The purported basis for Ordinance 64 was the Reexamination Report, which served as the vehicle for the 1991 Master Plan revision.

The 1991 Master Plan described the principal uses in the South Kearny area as consisting of "general warehousing, chemical storage/warehousing, heavy industrial uses and trucking terminals." It stated that these uses are "poor tax ratable and employment sources," and were an eyesore. No studies were cited to support the conclusion that these uses were "poor tax ratable and employment sources."

The 1991 Master Plan further stated that truck terminals involving trailer truck parking and storage with minimal on-site improvements occupy 475 acres of land or 52% of the total South Kearny land area, and recognized trucking as the dominant land use in South Kearny.

Per the 1991 Master Plan, over 75% of the South Kearny properties used for truck terminals are located north of Lincoln Highway. It further states that the "geographical distribution of these uses is key to any consideration for adjustment of both the Land Use Plan and implementing the Zoning Ordinance for the South Kearny area."

The 1991 Master Plan considered the area south of the Pulaski Skyway to north of Lincoln Highway to be a separate study area. It determined that "trucking terminals dominate this central portion of the South Kearny study area." It recommended that "trucking terminals be continued to be permitted as a matter of right within this area which will also be designated SKM-1."

The 1991 Master Plan recommended that South Kearny be rezoned into two "distinct districts; SKM-1 and SKM-2." The purpose of the two zones was to "permit specific uses and create transitional areas and uses between the railroad yards, truck terminals, and the PSE&G power plant on the north and the far southern tip of South Kearny where River Terminal Development and other internal storage, warehousing, and industrial facilities are located." The 1991 Master Plan states that truck terminals will be permitted as a "matter of right" in the SKM-1 zone. Other uses will be encouraged via changes to height, coverage and density criteria. Truck terminals will be permitted to expand and modify subject only to site plan approval where compliance with updated use and site design requirements will have to be satisfied.

In 2002, Kearny retained Heyer, Gruel & Associates, P.A. to prepare a Master Plan Reexamination Report. On May 7, 2003, the Town Council adopted this measure. This Report recommended numerous changes to the 1991 Master Plan and to the zoning ordinances applicable to South Kearny, including the creation of a new dividing line between certain uses in South Kearny. This new zoning boundary designated additional truck-related properties in the no-trucking zone.

Consistent with the Reexamination Report, Ordinance 64 divides the former South Kearny Manufacturing Zone into the SKI-N and SKI-S Zones. Under Ordinance 64, permissible uses in the SKI-N Zone include, but are not limited to, the following: motor freight facilities, freight forwarding facilities, intermodal facilities, truck terminals, warehouse and distribution facilities and railroad terminals and yards.

In contrast, the SKI-S "no trucking" Zone may include any use permitted in SKI-N *except* many of the truck, railroad and container-related uses that are permitted within the SKI-N Zone, including motor freight facilities, freight forwarding facilities, intermodal facilities and trailers. Ordinance 64 also amended many of the use, bulk, yard, buffer and area requirements/ restrictions within both the SKI-N and SKI-S Zones, despite the fact that the Reexamination Report fails to provide any support or justification for this.

Section 36-9.2(c) of the Town of Kearny Land Use Code grants broad discretion to construction officials to determine whether the requirements of Ordinance 64 should be extended to apply to Northern Zone properties. Construction officials have the discretion to refer an application for a building permit or for site plan approval. Thus, merely requiring a building permit would trigger compliance with Ordinance 64 for Northern Zone properties.

Per Ordinance 64, Northern Zone businesses that utilize, *inter alia*, "outdoor storage of containers, off street parking and loading," and are later required, through business necessity, to change the use of their property in a way which would invoke the provisions of Ordinance 64 (to include a request for a building permit), now must face a terrible, Hobson's choice. They will either be forced to avoid, if possible, making necessary improvements to their properties, or they will be required to establish "a 25 foot-wide strip of landscaped open space, with heavy vegetative screening along its borders." 38:6-6[A](i).

If a property in the Northern Zone intends to utilize container storage, the Ordinance provides that this "minimum 25 foot landscaped buffer . . . shall contain a combination of deciduous and evergreen trees and shrubs and berming necessary to visually screen the proposed use." 38:6-6[F](2). These elaborate and confiscatory landscaping requirements find no support either in 1991 Master Plan or in the Reexamination Report, especially since the Board, Town and Planner have recognized the extremely dense use of property in South Kearny.

The Reexamination Report says nothing about the need for a 25-foot wide "buffer." By way of an example and hypothetical, this means that if you have a 125 foot wide property in the Northern section for storing containers or used for parking or loading, the property owner would be left with 75 feet of usable property to work on, a reduction of 40% of productive use!

Trial testimony demonstrated how difficult it would be for trucking operations to function properly within such a restricted area. By their very nature, trucks require a considerable amount of room to maneuver. Mr. Frank E. Kearney, President of Lincoln North and a long-time area property owner, provided uncontroverted testimony that the buffer requirement would render some of these properties "useless."

The implications of these zoning restrictions are disturbing. Every year, over 1,500,000 trucks enter and leave South Kearny. Petitioner's expert, Arthur Max, attested in the record, without contradiction, to the unique and critical nature of the South Kearny trucking industry as an engine of interstate commerce.

The record supports an even broader conclusion. Indeed, South Kearny is not only a hub of interstate commerce, but international trade, through its Foreign Trade Zones. 19 U.S.C. § 81(a) *et seq.*; 15 C.F.R. Part 400; N.J. Stat. Ann. § 12:13-1, *et seq.*

South Kearny's integrated commercial engine relies upon the planned, concerted and synergistic action of trucking, railroads and shipping. One of these commercial components cannot be impaired without damaging the functioning and efficiency of the others. The Reexamination Report anticipates the construction and expansion of a Portway Project, which will result in a twofold increase in port traffic by 2010, and a tenfold increase by 2040. This Report states that South Kearny must be in a position to capitalize upon the growth opportunities that this project will provide. Ordinance 64, in turn, crushes the dynamism of the trucking industry and renders South Kearny businesses ill-equipped to adapt and expand to accommodate market conditions.

The Town of Kearny's destructive rapacity, embodied in Ordinance 64, was not confined to its direct attack upon the trucking industry, with its combination of outright proscription in the Southern Zone and its straight-jacket and hair-trigger nullification of the weak grandfather clause applicable to the Northern Zone. It sought also to quickly and systematically starve the trucking industry and the businesses that rely upon it of critical support facilities that they must have to properly load and unload their cargoes from railroads and other locations. These are the same railroad facilities that the ICCTA keeps out of the reach of state power,

under the broad, protective umbrella of federal law. Ordinance 64 marks an attempt to thrust this vital federal interest aside, which will ultimately result in an endless backup and logjam of trains, idling indefinitely, all the while laden with vast stores of now immovable cargo.

If Ordinance 64 is to be read with a literal eye, private trucking will become an endangered and extinct species and the functioning of the railroads be severely impaired. It will also be open season on protected federal targets as well. The federal postal distribution facilities in South Kearny, also located within Ordinance 64's expansive breath, are purportedly subject to this Ordinance's proscriptive anti-trucking mandates.

The Post Office cannot move our mail without trucks to do it. The practical application of Ordinance 64 to the Post Office would both be unconstitutional and a federal crime. The Ordinance neither acknowledges nor carves out any exception that would preclude its application to federal mail, which now must be transported by trucks that are now "outlawed" in the lawless urban wilderness of the Town of Kearny. Such a measure, although comical in its incompetence, nevertheless represents a breathtaking arrogation of federal authority.

Lincoln North challenged the imposition of these industry-killing restrictions by filing an action in lieu of prerogative writ in the New Jersey Superior Court, Law Division, Hudson County, on December 28, 2004. The Commerce Clause issue was raised in the Third Count of Lincoln North's Complaint. This

issue was raised again on appeal and addressed on Pages 38-44 of Lincoln North's March 9, 2007 appeal brief. The Commerce Clause issue was also raised and briefed on the merits on Pages 3—11 of Lincoln North's April 4, 2008 Petition for Certification.

The issue of preemption under the Interstate Commerce Commission Termination Act ("ICCTA") was raised on Page 22 of Lincoln North's February 15, 2006 Trial Brief. The ICCTA preemption issue was addressed again on Pages 47-48 of Lincoln North's appeal brief, and further on Pages 13-18 of Lincoln North's June 14, 2007 appellate reply brief. This issue was also raised and briefed on the merits on Pages 12-16 of Lincoln North's Petition for Certification.

The issue of the Federal Post Regional Mail Distribution Center being located in the no-trucking zone was raised on Pages 10-12 of Lincoln North's appellate reply brief, and was further addressed on Pages 16-18 of Lincoln North's Petition for Certification.

The Law Division ultimately rendered a decision that was rife with errors and was marked by an extreme deference to a local municipality and its reckless zoning practices. The Appellate Division affirmed this judgment in a cursory opinion that engaged in no independent legal analysis. Lincoln North sought discretionary review with the New Jersey Supreme Court, which was denied on May 16, 2008. This Petition followed.

REASONS FOR GRANTING THE PETITION

Ordinance 64 is an industry killing measure. Although businesses fail each and every day throughout our nation, there are certain critical industries that cannot be eliminated through misbegotten state action, without raising serious constitutional concerns.

This nightmare, worst-case scenario is what has occurred here. The Town of Kearny, with blind avarice, has enacted a municipal ordinance, Ordinance 64, which will inevitably and inexorably destroy the viability of the largest truck transport center in the New York metropolitan area. This Ordinance will constrict, and eventually destroy, a little-known to the general public, but nevertheless vital, artery of interstate and international commerce. It is respectfully submitted that the Court should exercise its discretion to address, as a matter of first impression, the issue of whether a municipality may be so empowered to engage in such reckless destruction of a vital keystone of commerce and transportation, despite overwhelming federal interests to the contrary.

The restrictions placed upon the trucking industry also include crowding out and starving the trucks' and the railroads' support facilities, which further flies in the face of the mandates of the ICCTA. The New Jersey courts' cramped interpretation of ICCTA preemption runs counter to the decisions of all thirteen Circuit Courts of Appeal.

Perhaps the ultimate, crowning, absurdity of Ordinance 64 is that it extends its expansive "no-trucking zone" to cover the business operations of one of the most trucking-intensive industries in the United States; *i.e.*, the handling and transportation of the United States mails out of a South Kearny's Regional Postal Distribution Center, which, like South Kearny's now threatened truck and train transport, covers no less territory than the entire Northeastern Corridor. Such an outrageous abuse of power is unprecedented in the annals of Anglo-American jurisprudence.

ARGUMENT

I. Review is Warranted To Address An Issue of First Impression Relating To The Scope and Application of the Dormant Commerce Clause to Municipal Ordinances Designed to Destroy Industries which are Vital to the Free Flow of Interstate Commerce.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. ART. I, § 8, cl. 3. The Commerce Clause places strict limitations upon the ability of states to erect barriers to the free flow of interstate trade. *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 100 S. Ct. 2009, 64 L. Ed. 702 (1980).

The Dormant Commerce Clause bars states "from regulating interstate commerce in a manner which significantly interferes with the national economy." *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 843 (1st Cir. 1988). This doctrine applies not only to states,

but to local and municipal governments as well. *See Dean Milk v. City of Madison*, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951).

Although the Commerce Clause "does not explicitly limit state interference with interstate commerce, the Supreme Court nonetheless has held that the clause prohibits states from taking certain actions regarding interstate commerce even absent Congressional action." *Old Bridge Chemicals, Inc. v. New Jersey Dep't of Envt'l Protection*, 965 F.2d 1287, 1291 (3d Cir.), *cert. denied*, 506 U.S. 1000 (1992). It renders null and void laws that place "burdens on interstate commerce [that are] clearly excessive in relation to the putative local benefits." *American Trucking Associations, Inc. v. Whitman*, 136 F. Supp. 2d 343, 349 (D. N.J. 2004), *aff'd*, 437 F.3d 313 (3d Cir.), *cert. denied*, 127 S. Ct. 349 (2006).

This case presents a critical issue of first impression which this Court should decide; *i.e.*, whether the severe impairment of the use of a local artery and chokepoint of interstate commerce, brought about through the throttling of local transport industries in a centralized, strategic commercial location, violates the Dormant Commerce Clause. The closest case on point arose twenty-seven years ago in the Western District of New York in *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653 (W.D.N.Y. 1981). In *Pittston*, the City of Rochester passed several ordinances in 1980 that prohibited shipping terminals, warehouses, and distribution centers in its port and changed the zoning from a commercial harbor district to a "River – Harbor District." *Id.* at 656-57. The City also passed an ordinance prohibiting roll-on/roll-off trailer ship service,

which had recently been proposed as a mechanism to expedite the transfer of cargo from truck to ship. *Id.* at 657. A shipping company leasing the port area challenged the ordinances on the grounds that they violated the Dormant Commerce Clause. *Id.* at 657-58.

The City contended that it had validly exercised its police power to protect the environment, public health, safety and welfare. *Id.* at 658. As to the ordinance prohibiting shipping terminals, the City claimed that the ordinances only affected future uses and had no impact upon the existing shipping company because it had been grandfathered as a preexisting nonconforming use. The City argued that anyone seeking to conduct commercial activities at the port could apply for a variance. *Id.*

The District Court rejected the City's argument that there was no cognizable impact on interstate commerce, given the existence of a legal nonconforming use and the ability to apply for variances. The Court concluded that the ordinances "probable impact" on the shipping company and those engaging in interstate commerce at the port was "self-evident." *Id.* at 659.

After finding that the ordinances had an adverse impact upon interstate commerce, the Court turned to the issue of whether they amounted to economic protectionism. *Id.* at 660. The Court found that their effect was to forever halt commercial shipping at the port. As such, the City's action demonstrated "outright economic isolationism and patent economic protectionism", and was "unconstitutionally invalid per se." *Id.*

Pittston thus held that the Commerce Clause cannot tolerate such a result even when only one company is affected. *Pittston* also provides an illustration of a municipality's failed attempt to slowly and systematically strangle a thriving commercial center by nominally permitting the operation of its current operations, while simultaneously crippling its ability to adapt and expand to ever-changing market conditions in violation of the Dormant Commerce Clause. Our rapidly changing global, high-tech computerized knowledge and information economy still has not dispensed with the critical need for trucks to keep our national commercial engines running.

An ironic and paradoxical truth is that as this world and its economy get larger, the power of one person with a computer and one municipality with commercially destructive designs and a reckless determination to implement them, at whatever cost to society, has never been greater. Lincoln North invites this Court to address the Dormant Commerce Clause issue raised in this Petition, in order to protect the national economy from the rogue and constitutionally insubordinate actions of municipalities whose short-sighted overlords seek the fool's gold of short-term real estate tax revenues, their eyes all the while blind to the fact that these same infrastructure destroying measures will harm the national transportation network, and the economy that it keeps afloat. Such strategic dislocations can lead to a widespread and ruinous cascade of economic failures, severe resource distribution disruptions, and chronic market scarcities until the root cause of the problem is isolated. The Constitution does not require the government to wait, perhaps indefinitely, in order to act upon such corrosive threats to our national economic fabric.

II. Review is Warranted To Resolve the Conflict Between All Thirteen Circuit Courts of Appeal and the New Jersey Courts on the Issue of ICCTA Preemption.

Article VI, Clause 2 of the United States Constitution "provides that the laws of the United States shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The New Jersey state courts rejected, on summary judgment, Lincoln North's argument that Ordinance 64 was subject to preemption under the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101, *et seq.*, which contains a broad preemption provision. 49 U.S.C. § 10102(6)(A).

CSX, a member of Lincoln North, is a railroad with substantial national operations. It would therefore seem obvious that any attempted local governmental restrictions upon its railroad routes and their necessary support and unloading operations that are its lifeblood would be preempted. Indeed, this is the law of all thirteen Circuit Courts of Appeal. *See Rhymes Heating Oils, Inc. v. Springfield Termination Railway Co.*, 358 F.3d 82 (1st Cir. 2004); *Sullivan v. American Airlines, Inc.*, 424 F.3d 267 (2d Cir. 2005); *New York Susquehanna & W. Railway Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007); *Ward v. Allied Van Lines*, 231 F.3d 135 (4th Cir. 2000); *VRC, LLC v. City of Dallas*, 460 F.3d 607 (5th Cir. 2006); *CSX Transp. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002); *Gordon v. Allied Van Lines*, 130 F.3d 282 (7th Cir. 1997); *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858 (8th Cir. 2005); *Emmert Indus. Corp. v. Artisan Assocs.*, 497 F.3d

982 (9th Cir. 2007); *Port City Properties v. Union Pacific Railroad*, 518 F.3d 1186 (10th Cir. 2008); *Galactic Towing, Inc. v. City of Miami Beach*, 341 F.3d 1249 (11th Cir. 2003); *CSX Transp. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005); and *Presault v. United States*, 100 F.3d 1525 (Fed Cir. 1996). The New Jersey state courts in this case, however, expressly and inexplicably held otherwise. This result cannot stand.

The scope of the defiance of federal law in this area of strong Congressional and national security interests cannot be underestimated. Nor can its potential implications for the viability of a uniform Congressional scheme on the issue of national transportation in the face of challenges from newly assertive states and localities be ignored.

As to the scope of the violation of the law, the expansive reach of the ICCTA extends to all "transportation by rail carrier." *Id.* at § 10501(a); *The New York, Susquehanna & Western Railway Corp. v. Jackson*, 2007 U.S. Dist. LEXIS 11907, *47-48 (D. N.J., Feb. 20, 2007). Covered aspects of "transportation" broadly include the following:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and the interchange of passengers and property. . . .

The ICCTA defines "rail carrier" as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). The following transportation support facilities and mechanisms are incorporated in the ICCTA's equally broad definition of "railroad":

> (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
>
> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
>
> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

Id. at 10102(5). *See Green Mountain Railroad Corp. v. State of Vermont*, 404 F.3d 638, 644 (2d Cir.)(preemption extends to all industries "that rely upon trucks"), *cert. denied*, 546 U.S. 977 (2005).

Other Lincoln North business properties extend far beyond the property lines of CSX and also fall within the preemptive scope of ICCTA. The Law Division never permitted Lincoln North to argue that Lincoln North member American President Lines, Ltd. ("APL") leases an 80-acre property adjacent to CSX, which CSX uses as an auxiliary yard!

The CSX property is approximately 300 acres, 90% of which must be utilized for the movement, transfer, loading and unloading of cargoes that arrive throughout the day and night by rail. Within this bustling hive of international and interstate commerce, there is no room on the CSX property for even the short-term storage of the goods that have been shipped to its railhead. CSX does not have anything close to adequate space to provide for even short-term storage of the massive amounts of materials that are delivered to its railhead every day.

Last year, CSX moved 305,000 trailers out of its gate, an average of 25,416 trailers per month. CSX's property is far too small to permit these trailers to stay on its property as they await pickup and delivery. Trailers must be parked on adjoining properties throughout South Kearny. APL handles only a small fraction of these deliveries, which must then be sent to other Lincoln North members for storage and later transport, lest massive demurrage charges be levied upon the customer.

Just as trucks are still a vital aspect of our national transportation grid, so are our railroads. Congress has acknowledged this through the enactment of omnibus transportation bills and measures such as the ICCTA. In this case, the Town of Kearny, its agents and representatives, aided and abetted by compliant New Jersey courts, have brazenly established an end-around to this critical Congressional Act. Accordingly, it is respectfully submitted that certiorari should be granted on this issue as well.

III. Review is Necessary to Resolve a Clash between Ordinance 64, as interpreted by New Jersey courts, and Federal Criminal Laws, Which Proscribe Interference with the Mails.

Incredibly, Ordinance 64 places the Kearny Postal facility in the no-trucking zone. Does this mean that the Post Office will not be able to truck the mail? This situation is even more mind-boggling when one considers that South Kearny is a Regional Mail Distribution Center for New Jersey's Northeastern Corridor! This is a massive operation, an engine of interstate commerce unto itself, with literally hundreds of mail trucks that operate out of its facilities every day.

Interference with the mails has been federally proscribed on Constitutional grounds for centuries. *Gibbons v. Ogden*, 22 U.S. 1, 184, 9 Wheat 1, 6 L. Ed. 23 (1824); U.S CONST. ART. I, § 8, CL.7. As the Third Circuit noted in *United States v. Lavin*, 567 F.2d 579, 580 (3d Cir. 1977), "Congress has provided criminal penalties for activities that interfere with the Postal Service's mandate to deliver the mail." *See* 18 U.S.C. § 1702; 18 U.S.C. § 1703(a).

These criminal statutes, juxtaposed with Ordinance 64, have raised the possibility of the disruption of Kearny postal facilities and the inevitable clash of sovereignties and the consequent incarceration in federal prison of municipal agents who are called upon to either (1) enforce Ordinance 64 and risk arrest; (2) ignore the Ordinance and risk losing their jobs; or (3) without any guidance from a patently irrational legislative body, make their own subjective judgments.

The bizarre possibility of a municipal "crackdown" on the Post Office is but one more reckless act of a municipality that does not read and/or understand what it enacts and certainly does not comprehend what its consequences are. Certiorari should be granted in order to clarify the boundaries of federal and state power that Ordinance 64 has chosen to unlawfully ignore.

CONCLUSION

In *McCulloch v. Maryland*, 17 U.S. 316, 431, 4 Wheat 316, 4 L. Ed. 579 (1819), this Court, per Chief Justice John Marshall, pronounced that "the power to tax involves the power to destroy." In our modern administrative state, this same reasoning applies to the State's zoning power. The Town of Kearny is attempting to regulate the most concentrated component of the trucking industry in the Northeastern United States out of existence.

This ubiquity of trucked goods is a little-known, but obvious, fact. Virtually everything we have in our homes and our offices is delivered by truck. One need not be an expert as to interstate commerce to comprehend the following indisputable fact: If the Justices of this Court look around their individual chambers, go to the cafeteria, or otherwise do anything that must be accomplished in the ordinary course of courthouse business, you will note that virtually everything in the building — tangible property, foodstuffs, the very foundations of the courthouse — were at one time trucked to Washington, D.C. Moreover, these critical items which enable the Court to conduct its daily business more than likely were trucked from multiple destinations, one of which was, with a high degree of probability, South Kearny.

Given the prevalence of anti-trucking prejudice, there is nowhere else for Lincoln North's members to go. So, under the relentless stress of Ordinance 64, these businesses will, slowly but surely, close down, and a central magnet of interstate, indeed international, commerce will be eliminated.

All court decisions, even those nominally not-for-publication, are instantly accessible in our 21st Century information age. Thus, the decisions upholding Ordinance 64 can cause considerable jurisprudential mischief. Accordingly, Lincoln North respectfully requests that this Court grant its Petition for Certiorari and invalidate Ordinance 64 on the grounds that it violates the Commerce Clause, is substantially preempted by the ICCTA, and unlawfully seeks to interfere with the federal mails.

Respectfully submitted,

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